TUN DR MAHATHIR MOHAMAD
v. TUN MD RAUS SHARIF & ORS

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-236-06-2024]
25 JANUARY 2025

Abstract – *Under the second limb of s. 18 of the Commissions of Enquiry Act 1950, it is only discretionary and not imperative for a Royal Commission of Enquiry to allow a request to attend the entire duration of an enquiry, if the applicant is not a person who is subject to, implicated or concerned with matters under the enquiry. In such a circumstance, the remedy of mandamus will not be available to the applicant.*

ADMINISTRATIVE LAW: *Judicial review – Application for – Mandamus – Application to compel Royal Commission of Enquiry ('Commission') to allow applicant to attend entire duration of enquiry under s. 18 of Commissions of Enquiry Act 1950 ('Act') – Whether applicant was person subject to, implicated or concerned with matters under enquiry – Whether Commission established to enquire into conduct of applicant – Whether imperative or discretional for Commission to allow request for attending entire duration of enquiry under s. 18 of Act – Whether remedy of mandamus still available if Commission had submitted report to Yang di-Pertuan Agong*

The applicant was the former Prime Minister of Malaysia, while the respondents were the members of the Royal Commission of Enquiry, set up under the Commissions of Enquiry Act 1950 ('Act'), to enquire into the handling of matters related to the sovereignty case of Pulau Batu Puteh, Middle Rocks and South Ledge ('Commission'). On 23 May 2008, the International Court of Justice handed down a judgment which stated that Pulau Batu Puteh belonged to the Republic of Singapore ('ICJ's judgment'). As a response, the Government of Malaysia ('Government') filed two applications against the ICJ's judgment ('review applications'): one for a revision, while the other for an interpretation of the said judgment. However, the review applications were subsequently withdrawn by the Government. At that time, the Government was helmed by the applicant. After the applicant had left office, on 9 October 2021, which was during the tenure of another Prime Minister, it was announced that the Cabinet had resolved to set up a Special Task Force ('STF') to investigate on the withdrawal of the review applications. On 14 February 2024, during the tenure of the present Prime Minister, His Majesty, the Yang di-Pertuan Agong ('YDPA'), established the said Commission. The enquiry by the Commission was commenced on 21 May 2024. The applicant was identified as one of the

witnesses. On 20 May 2024, the conducting officers of the Commission reached out to the applicant seeking his free date to attend the enquiry. The applicant then requested to the Commission to attend the entire duration of the enquiry under s. 18 of the Act. After the said request was rejected ('Commission's decision'), the applicant, while being dissatisfied with the decision, sought leave of this court to commence judicial review proceedings against the Commission's decision. The judicial review sought was for various orders, but on 12 June 2024, leave was only granted with respect to an order for *mandamus* to compel the first to seventh respondents and any other members of the Commission to: (i) allow the applicant and his lawyers to attend the entire duration of the enquiry; (ii) serve the applicant and his lawyers all the relevant documents to be presented at the enquiry; and (iii) conduct the enquiry in public. During the hearing of the substantive application for the order of *mandamus* on 4 September 2024, the Commission had concluded its enquiry, and on 12 August 2024, handed their reports to the YDPA. In support of the substantive application, the applicant contended that he had reasonable grounds to believe that he was the subject or was implicated or concerned in the matter under the enquiry because of the following statements: (i) on 1 April 2024, a Minister in the Prime Minister's Department had propagated a statement to the effect that, it was the applicant who had made the decision to withdraw the review applications. It was also contended that the said decision was made in secret and without the advice of the then Attorney General; and (ii) in October 2021, the then Prime Minister was reported to have said that there was a possibility of negligence and oversight by the applicant over the issue of Pulau Batu Puteh. And the applicant might have made a mistake over the withdrawal of the review applications. As such, the issue that arose was whether the order of *mandamus* ought to be issued.

Held (dismissing substantive application for order of *mandamus*):

(1) The Commission, by its terms of reference, was not established to enquire into the conduct of the applicant. The allegation by the applicant that the Commission was established to enquire into his conduct was unfounded. Reliance on the statements made by the Ministers in support of the applicant's belief was irrelevant to the enquiry. The Commission must strictly confine itself to its terms of reference and nothing else. The Commission would be acting in excess of jurisdiction if it strayed outside the boundaries of its commission. (para 19)

(2) The applicant's legal rights were not affected by an enquiry which the applicant himself acknowledged was a 'fact-finding enquiry'. The conduct of the applicant was clearly not the subject matter of the enquiry. Therefore, the right to legal representation was not mandatory under s. 18 of the Act. Considering that the law on the remedy of *mandamus* was trite, and the remedy was only available if the

performance of the duty was imperative and not optional or discretionary, the Commission was not under a duty to allow the applicant to be represented by an advocate for the entire duration of the enquiry. (paras 22-24)

(3) The issue of whether the matter was academic or not was a non-issue to the relief of *mandamus*. The relief of *mandamus* lay to compel a public officer or body to do what the written law required which the public officer or body had refused to do. Herein, the order of *mandamus* could not be issued against the Commission as it was no longer in existence after having submitted its report to the YDPA. There was no longer any enquiry in respect of which the Commission could be the proper recipient of the order of *mandamus* sought by the applicant. (para 26)

Case(s) referred to:
Dhinesh Tanaphll v. Lembaga Pencegahan Jenayah & Ors [2022] 5 CLJ 1 FC ***(refd)***
Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(refd)***
Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd [2010] 5 CLJ 123 CA ***(refd)***
Milebush Properties Ltd v. Tameside Metropolitan Borough Council [2011] EWCA Civ 270 ***(refd)***
Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors [2017] 5 CLJ 595 CA ***(refd)***
Rolls-Royce Plc v. Unite The Union [2010] 1 WLR 318 ***(refd)***

Legislation referred to:
Commissions of Enquiry Act 1950, s. 18
Rules of Court 2012, O. 53 r. 3(8)

Other source(s) referred to:
MP Jain's Administrative Law in Malaysia and Singapore, 2nd edn, 1980, pp 449-450

For the applicant - Zainur Zakaria, Muhammad Rafique Rashid Ali & Nurmustanir Md Nor; M/s Law Practice of Rafique
For the 1st - 8th respondents - Shamsul Bolhassan, Nurhafiza Azizan; SFCs & Ng Wee Li; FC

Reported by Syamim Ariffin

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] On 5 June 2024, the applicant, Tun Dr Mahathir bin Mohamad, sought leave of this court to commence judicial review proceedings for the following orders:

(i) a declaration that the applicant is a person whose conduct is subject of enquiry, or who is implicated or concerned in the matter under enquiry of the Royal Commission of Enquiry to review the handling of matters related to the sovereignty case of Batu Puteh, Middle Rocks and South Ledge under s. 18 of the Commissions of Enquiry Act 1950).

A (ii) an order of *mandamus* to compel the first to seventh respondents and any other member of the said Royal Commission of Enquiry to:

(a) allow the applicant and his lawyers to be present during the whole of the enquiry of the said Royal Commission of Enquiry;

B (b) serve the applicant and his lawyers with all documents, list of witnesses and/or other documentary evidence to be presented at the enquiry of the said Royal Commission of Enquiry; and

(c) conduct the enquiry of the said Royal Commission of Enquiry in public.

C (iii) an order of prohibition prohibiting:

(a) the first respondent from acting as chairman of the said Royal Commission of Enquiry; and

(b) the third and sixth respondents from being members of the said D Royal Commission of Enquiry.

(iv) an order that all proceedings of the said Royal Commission of Enquiry be stayed pending the final disposal of this application, pursuant to O. 53 r. 3(8) of the Rules of Court 2012.

E **[2]** Leave was only granted for to commence judicial review proceedings for an order of *mandamus* to compel the members of the said Royal Commission of Enquiry ("the Commissioners") to allow the applicant and his advocate to be present during the whole of the enquiry. There was an appeal against the refusal to grant the remaining prayers but that appeal has F since been withdrawn.

[3] On 13 January 2025, I dismissed the substantive application for the order of *mandamus*. These are the reasons for my decision.

Background Facts

G **[4]** The salient facts. Malaysia and Singapore were in a territorial dispute over the sovereignty of Pedra Branca otherwise known as Pulau Batu Puteh. The dispute was brought to the International Court of Justice, which on 23 May 2008 handed down a judgment stating that Pulau Batu Puteh belongs to the Republic of Singapore.

H **[5]** In response to the judgment, Malaysia filed two applications: one for revision and the other for an interpretation of the judgment ("the review applications"). The review applications were subsequently withdrawn by Malaysia, which effectively ended the dispute over Pulau Batu Puteh. The facts show that the review applications were withdrawn during the tenure of I the applicant as Prime Minister of Malaysia. On 9 October 2021, after the applicant had left office and during the tenure of Dato' Sri Ismail Sabri as

Prime Minister ("Ismail Sabri"), it was announced that the Cabinet had resolved to set up a Special Task Force ("STF") to investigate the withdrawal of the review applications.

[6] Thereafter, on 14 February 2024, during the tenure of the present Prime Minister, Datuk Seri Anwar Ibrahim, a Commission of Enquiry ("the Commission") was set up by His Majesty, the Yang di-Pertuan Agong ("YDPA") pursuant to the Commissions of Enquiry Act 1950 relating to not only Pulau Batu Puteh but also Batuan Tengah and Tubir Selatan. The enquiry by the Commissioners commenced on 21 May 2024 and the applicant was identified as one of the witnesses. On 20 May 2024, the conducting officers reached out to the applicant seeking his free date to attend the enquiry.

[7] The applicant, on the same day by letter, amongst others, requested to attend the entire duration of the enquiry with his counsel pursuant to s. 18 of the Commissions of Enquiry Act 1950. The applicant took the position that the Commission was set up to enquire into his conduct concerning the subject matter of the enquiry. On 21 May 2024, the Commissioners disagreed with the applicant and refused his request. Dissatisfied with the refusal, the applicant, on 5 June 2024, sought leave of this court to commence judicial review proceedings for the prayers stated in para. [1] above.

[8] On 12 June 2024, the same day the other prayers for leave were refused, the applicant attended and testified before the Commissioners at 11am, accompanied by his legal counsel. The Secretary of the Commission, Zamri bin Misman, averred that the Commissioners had enquired into the matter based on the terms of reference in respect for which the Commission was set up by His Majesty. The Commissioners, at the conclusion of the enquiry, prepared a final report containing the outcome of the studies made, their analysis and recommendations for consideration by the Cabinet.

[9] On 4 September 2024, at the time of hearing the substantive application, the Commissioners had concluded its enquiry and on 12 August 2024 handed their report to His Majesty as required by the terms of the Commission.

Analysis And Decision

[10] The only issue before me was whether the order of *mandamus* be issued as prayed by the applicant.

Applicant's Submission

[11] In this regard, the applicant submitted that although the Commission was a "fact-finding enquiry" the applicant had reasonable grounds to believe the applicant's conduct was the subject of the enquiry or who is implicated or concerned in the matter under enquiry. Therefore, the applicant argued

A that he is entitled to be represented by an advocate throughout the whole of the enquiry as required by s. 18 of the Commissions of Enquiry Act 1950. Section 18 of the Commissions of Enquiry Act 1950 is reproduced below for its effect and purport:

> *Any person whose conduct is the subject of enquiry under this Act, or who is in any way implicated or concerned in the matter under enquiry, shall be entitled to be represented by an advocate at the whole of the enquiry,* and any other person who may consider it desirable that he should be so represented may, by leave of the Commissioner or Commissioners, be represented in the manner aforesaid. The Attorney General, the Solicitor General, any Federal Counsel, or any legally qualified member of the State Attorney General's Chambers, Sabah or Sarawak, authorized in that behalf by the State Attorney General, shall be entitled at any time to appear before and address the Commissioners on any matter which to the Attorney General appears to be relevant to the enquiry. (emphasis added)

[12] The applicant's grounds for believing that his conduct was the subject of the enquiry or who was implicated or concerned in the matter under enquiry was based on statements appearing in the New Straits Times. The statements are:

(i) the first statement was attributed to have been made by the Minister in the Prime Minister's Department (Law and Reform) in the Dewan Negara to the effect that the then Prime Minister, who was the applicant, had made the decision to withdraw the review applications in secret and without the advice of the Attorney General. These statements were made on 1 April 2024.

(ii) the other statement was attributed to Ismail Sabri who was reported saying on October 2021 that there was a possibility of negligence and oversight by the applicant over the Pulau Batu Puteh issue and that the Cabinet was informed by the Special Task Force set up to inquire into the Pulau Batu Puteh issue that the applicant may have made a mistake in withdrawing the review applications.

The Submission On Behalf Of The Commissioners

[13] It was submitted by Senior Federal Counsel that the terms of reference under which the Commissioners were confined to were not in any way targeting the applicant. Therefore, the Commissioners had acted in accordance with s. 18 of the Commissions of Enquiry Act 1950 by only allowing the applicant to be present with his advocate during the time he was being called upon to testify, as opposed to the right to be present during the entire enquiry.

[14] It was also submitted that the decision of the Commissioners was in line with the terms of the Commission to hold the enquiry in private. This submission can easily be disposed of at this stage as the direction to hold the

enquiry in public or private does not affect the right to be represented by an advocate if the conduct of a person or of a person who is in any way implicated or concerned with the subject matter under enquiry. The right is a guaranteed right that cannot be denied to the person whose conduct is under enquiry or to a person who in any way implicated or concerned in such enquiry.

[15] The decision of the Court of Appeal in *Peguam Negara Malaysia v. Nurul Izzah Anwar & Ors* [2017] 5 CLJ 595 in the following paragraph of the judgment demolished this submission:

> [36] ... This section clearly comprises three limbs. The first limb deals with the right to representation by counsel which is available to any person whose conduct is the subject of enquiry under Act 119, or who is in any way implicated or concerned in the matter under enquiry. This right, so far as the enquiry concerns this category, is without doubt guaranteed as of right.

[16] The applicant is relying on the first limb of s. 18 of the Commissions of Enquiry Act 1950 for the order of *mandamus*. The evidence shows that he had asked to be represented by an advocate but was denied by the Commissioners. The applicant has turned to this court to compel the Commissioners to grant him the right to be represented by his advocate.

[17] There is no doubt that a person who falls within the first limb of s. 18 of the Commission of Enquiry Act 1950 has a right of representation by an advocate which cannot be denied to him. In *Nurul Izzah Anwar,* the Court of Appeal gave the intention of the Legislature for such a person being accorded legal representation in the following words:

> It is not difficult to fathom the reason why s. 19 of Act 119, insofar as it concerns the person who is the subject of an enquiry, guarantees this right. This is because the legal right of the person whose conduct is the subject of enquiry may be affected by the outcome of such enquiry. The right to legal representation is thus necessary.

[18] In contrast, the second limb, which states, "any other person who may consider it desirable that he should be so represented may, by leave of the Commissioners", be so represented. In this instance, the Commissioners have the discretion to allow or not allow the request.

Decision On The Merits

[19] The Commission, by its terms of reference, was not established to enquire into the conduct of the applicant as alleged by the applicant. Therefore, the allegation by the Commission was established to enquire into his conduct is unfounded. Reliance on statements made by the Ministers in support of his believe is irrelevant to the enquiry. The Commissioners must strictly confine itself to the terms of reference and nothing else. The Commissioners would be acting in excess of their jurisdiction if they stray outside the boundaries of their commission.

[20] In the instant case, the first term of reference required the Commissioners to certify, amend or alter any facts or discoveries that have been recorded by the Special Task Force commissioned by the Cabinet to submit a report on the Sovereignty of Pulau Batu Puteh, Middle Rocks and South Ledge. Such certification, amendment or alteration is to be made through the discoveries of further evidence related to the said report, taking into account the challenges that have been encountered by the Special Task Force in preparing the outcome of its findings. The report is a privileged document solely for the Cabinet. One obvious challenge of any such task force commissioned by the Cabinet is that it does not have coercive powers to secure the attendance of witnesses like a Commission of Enquiry established under the Commissions of Enquiry Act 1950. If witnesses do not attend or documents are not furnished, the report of the task force would be lacking in facts. So much for the first of reference.

[21] The second and third terms of reference are related. The second, requires the Commissioners to give their opinion, after examining and reviewing the facts, if any related party have violated any laws, work norms or administrative circular in the performance of their duties while the third is to assess, identify and propose recommendations relating to the legal and non-legal actions that may be taken:

(i) against any related parties handling the claims;

(ii) to improve the work process in relation to the process or relating to the claims; and

(iii) to protect Middle Rocks and South Ledge and the surrounding territorial water around Batu Puteh, Middle Rocks and South Ledge.

[22] Secondly, the applicant's legal rights are not affected by an enquiry which the applicant himself acknowledges is a "fact-finding enquiry". The conduct of the applicant was clearly not the subject matter of enquiry. Thus, the right to legal representation is not mandatory under s. 18 of the Commissions of Enquiry Act 1950.

[23] In this regard, the law on the remedy of *mandamus* is trite. The remedy is only available if the performance of the duty is imperative and not optional or discretionary. It suffices to quote the principle established in *Menteri Besar Negeri Pahang Darul Makmur v. Seruan Gemilang Makmur Sdn Bhd* [2010] 5 CLJ 123, the following statement by the learned author in *MP Jain's Administrative Law in Malaysia and Singapore*, 2nd edn, 1980 at pp. 449 and 450, which is in the following words:

> ... *Mandamus* can be granted only when a legal duty is imposed on an authority and the applicant has a legal right to compel the performance of the public duty prescribed by law, and to keep the subordinate bodies and officers exercising public functions within the limit of their jurisdiction. *Mandamus* is thus a very wide remedy which is available against a public officer to see that he does his duty.

[24] Therefore, the Commissioners were not under a duty to allow the applicant to be represented by an advocate for the entire duration of the enquiry. In any event, an order of *mandamus* sought by the applicant cannot lie or be issued when there is no recipient of such order, given that, the Commission is no longer in existence after submitting their report to His Majesty.

Decision On The Academic Issue

[25] The other issue strenuously ventilated before me by the parties was whether the matter had become academic when the enquiry was concluded and the report of the Commission was on 12 August 2024 handed over to His Majesty. Much industry on the issue had gone into the submissions of both counsels.

[26] In my view, the issue of whether the matter was academic or not is a non-issue to the relief of *mandamus*. The relief of *mandamus* lies to compel a public officer or body to do what the written law requires, which the public officer or body had refused to do. Here, the order of *mandamus* cannot be issued against the Commissioners as the Commission no longer exists after having submitted their report to His Majesty. There is no longer any enquiry in respect of which the Commissioners would be proper recipients of the order of *mandamus* sought by the applicant.

[27] In their submissions, both parties submitted on the issue of "the matter has become academic", referring to cases mainly where declarations were sought. The principles governing the granting of a declaratory order are instructively set forth by Aikens LJ in *Rolls-Royce Plc v. Unite The Union* [2010] 1 WLR 318 at para. 120, which was modified in *Milebush Properties Ltd v. Tameside Metropolitan Borough Council* [2011] EWCA Civ 270. The principles of relevance for our purpose are: (i) the power of the court to grant declaratory relief is discretionary; and (ii) that the court will be prepared to give declaratory relief in respect of a "friendly action" or where there is an "academic question" if all parties so wish. In other words, academic questions are generally not granted if objected to.

[28] The Federal Court in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579; [2021] 1 MLJ 750 clearly illustrated the exception to the general principles as follows:

> [457] The general principles applicable to a declaration based on public interest to overcome what is otherwise an academic exercise are summarised in *Rolls-Royce Plc v. Unite the Union* [2010] ICR 1 as modified in *Milebush Properties Ltd v. Tameside MBC* [2011] EWCA Civ 270. The two main features of the limitation of the court's discretion are **justice of the case** and the **utility of the adopted measure.** (emphasis added)

[29] The instant case does not concern a declaratory order. While a declaratory order is discretionary, as there are many factors to consider, an order of *mandamus*, on the other hand, is only concerned with the issue of whether what was not done by the public officer or body is mandatory. This court has no discretion in the matter, which is mandatory for the public officer or public body to perform.

[30] Likewise, the preventive detention cases seeking the remedy of *habeas corpus* concern the issue of whether the initial arrest or detention was valid. In *Dhinesh Tanaphall v. Lembaga Pencegahan Jenayah & Ors* [2022] 5 CLJ 1; [2022] 3 MLJ 356 and the other cases relied by the applicant, the principle is a prior defect was not academic and remained available to be considered by the courts even after the expiry of a remand order, which was overtaken by a subsequent order of detention by the Minister. Therefore, the issue of "academic" is not an issue.

Conclusion

[31] For the above reasons, the application for an order of *mandamus* is refused.